BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SCOTT WALKER Claimant	)	
VS.	)	
COMPRESSED GASES, INC. Respondent	)	Docket No. 1,014,378
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the March 1, 2005 Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on August 19, 2005.

APPEARANCES

Dale Slape, of Wichita, Kansas, appeared for the claimant. Janell Jenkins Foster, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ averaged the task loss opinions of Dr. Philip R. Mills and Dr. Pedro A. Murati and found claimant is entitled to a 36 percent task loss. The ALJ also found that based on the claimant's job search list, which indicated he had contacted 150 prospective employers, claimant made a good faith job search and had an actual wage loss of 100 percent. Accordingly, the ALJ awarded claimant a 68 percent work disability.

The respondent and its insurance carrier request review of the ALJ's finding concerning the nature and extent of claimant's disability. Respondent argues claimant should only be entitled to his functional impairment because he failed to make a good faith effort to become re-employed. Respondent claims that although claimant's job search list contains names of over 150 businesses claimant contacted in his search for employment, only a few were fast-food employers, even though fast-food employment is easily obtainable and claimant had previously worked for two fast-food businesses. Respondent requests that the Board impute claimant an average weekly wage of $551.13 and find he has a 0 percent wage loss.

Should the Board find claimant is entitled to an award based on work disability, respondent argues the ALJ erred in not including the 0 percent task loss opinion of Dr. Steven R. Hughes and instead only averaging the task loss opinions of Dr. Mills (28 percent) and Dr. Murati (44 percent) in determining claimant's task loss. An average of all three task loss opinions would calculate to 24 percent.

Claimant argues he is entitled to a 72% work disability using the 44% task loss opinion of Dr. Murati and claimant's actual 100 percent wage loss. Claimant contends he made a good-faith effort to become re-employed. Claimant asserts that he did not apply for some fast food jobs because they exceeded his restrictions, but that he did apply to Subway, Taco Bell and Braums, all of which are considered fast-food employers.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered personal injury by accident arising out of and in the course of his employment on October 2, 2003. Claimant had worked for respondent about three years. At the time of the accident, claimant was on a semi-trailer bed in a squatting position strapping down gas acetylene bottles with a ratchet strap. The strap broke, and claimant fell backwards on the trailer, landing on his back and tailbone. Claimant felt instant pain and had to be helped up. Claimant notified his the plant manager immediately, and one of the owners of the company was called.

Respondent made an appointment for claimant to see Dr. Harold Stopp the day of the accident; thereafter claimant was seen by Dr. Hughes, who is board certified in family practice. Claimant gave Dr. Hughes a history of falling backwards and hitting his lower and mid back. Dr. Hughes' assessment was mid back contusion and pain, and sacral and tailbone contusion and pain. Dr. Hughes ordered physical therapy and medication and placed claimant on work restrictions of no lifting, pushing or pulling greater than 10 pounds.

Dr. Hughes again saw claimant on October 24 and November 6, 2003. Claimant had been to physical therapy and told Dr. Hughes that the therapy was helping but he still had some pain. Dr. Hughes ordered more physical therapy and pain medication and increased claimant's lifting limit to 25 pounds.

Claimant's next saw Dr. Hughes on December 2, 2003. At that time, claimant said he was much better, complaining of just a little tightness. Claimant told Dr. Hughes he wanted to return to work and requested a full release. Dr. Hughes examined claimant and found muscle tightness at the L5 area; otherwise the examination was unremarkable. Dr. Hughes released claimant from care and did not assign any permanent work restrictions. Dr. Hughes did caution claimant to be careful and to continue his stretching exercises.

Upon his release to return to work, claimant took the paperwork to respondent and was told they no longer needed him. Rod Bell, respondent's plant manager, advised claimant that his position had been filled and that he had been laid off. Claimant has not worked since the accident.

A FCE[1] was performed on claimant on August 4, 2004. The recommendations of the FCE included:

> No lifting greater than 30# from the floor to waist level height and 20# from the floor to shoulder or shelf level height without assistance.
>
> Limit activities that require him to perform constant deep forward bending, reaching for long periods with both hands extended overhead or working in a full crouched position.[2]

Claimant's final visit to Dr. Hughes was on August 5, 2004. The purpose of that visit was for Dr. Hughes to go over claimant's FCE with him. At his deposition, Dr. Hughes said he had no opinion as to the validity of the results of the FCE and reiterated that at the time he last treated claimant, claimant had no permanent work restrictions. However, Dr. Hughes' office notes that day indicated: "We [clinic] will go by their [FCE] recommendations as far as restrictions at this time and those will be no lifting, pushing or pulling greater than 30 pounds, only occasional bend or squat or kneel."[3]

Steve Benjamin is a vocational rehabilitation counselor. At respondent's request, Mr. Benjamin evaluated claimant primarily for the purpose of determining his work tasks.

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[1]Functional capacity evaluation.

[2]Hughes depo., Ex. 1 at 23.

[3]Id., Ex. 1 at 19.

In preparing the work task inventory list, Mr. Benjamin included all the jobs claimant told him he performed in the 15 years before the accident and claimant's description of his duties for each of those jobs. He also reviewed the DOT[4] in preparing the 86-task list. Claimant's work experience included working at two fast food restaurants, Spangles and Pizza Hut. Mr. Benjamin's task list indicates that claimant believed he could still perform his former jobs at Spangles and Pizza Hut but further showed that there were tasks that exceeded his restrictions and, therefore, could no longer perform. Mr. Benjamin identified four jobs that he believed claimant could do within the restrictions given by Dr. Hughes and Dr. Murati: an electrical assembler, buffing machine operator, customer service representative and electrical accessories assembler. Mr. Benjamin believed claimant was capable of earning a wage in the amount of $551.13 per week and, therefore, did not give claimant a wage loss. At the August 11, 2004, interview, claimant told Mr. Benjamin that he had applied for approximately 200 positions.

Jerry Hardin, a personnel consultant, met with claimant on March 30, 2004, and prepared a task list in accordance with K.S.A. 44-510e. Based on the restrictions of Dr. Murati and the FCE, Mr. Hardin said that using an average weekly wage of $370, claimant's ability to earn a comparable wage has been reduced by 19 percent. Like that of Mr. Benjamin, Mr. Hardin's task list showed that claimant had lost the ability to perform certain of the tasks he performed at the fast food jobs with Spangles and Pizza Hut.

Claimant was seen by Dr. Pedro A. Murati on two occasions, January 26, 2004, and August 23, 2004. On January 26, 2004, Dr. Murati examined claimant and found that he had a depressed right hamstring reflex and decreased sensation at L5. Claimant's spine was tender to palpation at L5. Dr. Murati's diagnosis was low back pain with radiculopathy, and he recommended an MRI to rule out disc pathology, an NCS/EMG to evaluate radiculopathy, physical therapy, steroid injection, and anti-inflammatory and pain medications. If claimant failed to improve, Dr. Murati recommended surgical evaluation. Dr. Murati placed claimant on temporary work restrictions.

Claimant returned to Dr. Murati for a rating on August 23, 2004. Dr. Murati's examination of claimant's bilateral lower extremities revealed depressed hamstrings on the right. Sensory examination to pinprick revealed decreased sensation on the right L5 dermatome. Claimant's L5 spine revealed to be most tender with increased tone noted on the right. There was negative pelvic compression, SI joint and straight leg raising examination. Calf circumference was revealed to be symmetrical. A MRI of the lumbar spine taken August 3, 2004, revealed a bulge at L5-S1, but was otherwise unremarkable. Dr. Murati diagnosed claimant with low back pain with radiculopathy.

[4]Dictionary of Occupational Titles.

Using the AMA *Guides*,[5] Dr. Murati gave claimant a 10 percent whole person impairment. When asked whether he believed claimant should be placed on any permanent restrictions, Dr. Murati stated that the restrictions he would recommend were consistent with the FCE. Upon reviewing the report of Jerry Hardin, Dr. Murati testified that he agreed with Mr. Hardin's analysis and adopted the report's task loss of 44 percent

Dr. Mills saw claimant on July 21, 2004, on behalf of respondent. Dr. Mills reviewed the records of Dr. Hughes and Dr. Murati. Claimant told Dr. Mills he had pain in his low back and tailbone that was aggravated by activity, such as lawn mowing and bending over to put oil in his car. At the time of the examination, claimant was not taking any medication for the problem. Claimant was able to walk on his tiptoes and on his heels but noted low back pain with heel walking. Claimant was able to squat and return. Examination of the LS spine showed no gross deformity or obvious abnormality. Dr. Mills noted some tenderness over the right SI joint. Dr. Mills' diagnosis was low back pain. Using the AMA *Guides*, Dr. Mills gave claimant a 5 percent whole body impairment.

Giving equal weight to the functional impairment opinions given by Dr. Murati and Dr. Mills, the Board finds claimant's permanent impairment is 7.5 percent.

Dr. Mills found claimant had no work restrictions. After reviewing the task list prepared by Steve Benjamin, Dr. Mills testified that in his opinion, claimant had no task loss. However, after reviewing the FCE, Dr. Mills testified that he would adopt the FCE and changed his restrictions to go along with the report. After making this change of restrictions, Dr. Mills again reviewed the task list prepared by Mr. Benjamin and testified that claimant appeared to have lost 24 tasks out of 86, assuming the task list was accurate and had no duplications, for a task loss of 28 percent.

Rodney E. Bell, plant manager of respondent, Compressed Gases, Inc., testified that he believed claimant's injury was a compensable, work-related injury. Mr. Bell testified that when claimant returned to work after being released from care by Dr. Hughes, claimant was told he had been laid off and there was no position for him with respondent given his injury and limitations.

At the time of the regular hearing, claimant complained of a sharp pain going down the back of his leg when he bends or mows. He claimed he cannot bend over to work on cars because when he does his back cramps and he has pain in his lower back. His discomfort increases with activity.

An injured employee is barred from a work disability under K.S.A. 44-510e(a) if he or she is earning 90 percent or more of the employee's pre-injury wage. It is well settled

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[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

that an injured employee must make a good faith effort to return to work within their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).[6]

If an injured employee fails to make a good faith effort to find appropriate employment, a wage may be imputed based upon the employee's capacity to earn wages.[7] Before determining what wage the employee is still capable of earning, the factfinder must first determine if the employee has made a good faith effort to find appropriate employment.[8] If a good faith effort has been made, then the claimant's actual post-injury earnings will be utilized in determining the wage loss.

At the October 4, 2004, Regular Hearing, claimant produced a list of over 150 businesses where he had applied for jobs by leaving applications or résumés during the period of January through September 2004. Although the list does not show a completely consistent effort, as there were weeks when claimant's list did not show any contacts, overall it appears claimant made a reasonable effort to find appropriate employment. The Board agrees with the ALJ's conclusion that claimant made a good faith job search effort and, therefore, his actual 100 percent wage loss should be used for that prong of the two-part work disability formula. The Board likewise agrees that the restrictions and task loss opinions of Dr. Hughes are inconsistent and should be given no weight. The Board affirms the ALJ's finding that claimant has a 36 percent task loss and is entitled to a 68 percent work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated March 1, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2005.

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BOARD MEMBER

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[6] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Parsons v. Seaboard Farms, Inc.* 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

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BOARD MEMBER

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BOARD MEMBER

c: Dale Slape, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director